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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

WILLIAM A. McCANN, GEORGE J. MARCIN, THOMAS P. McGADY, AUGUST R. LOCALLO, JAMES R. HUTTON, MICHAEL J. CONNOLLY, ROBERT S. VETROVEC, WILLIAM J. DUFFY, CALDRON MANNS, ANTHONY PALKA, JOHN GRIFFITH, WILLIAM BRANSFIELD, JAMES P. MOSS, ERNEST K. TAYLOR, KENNETH BROOKS, individually and on behalf of all others similarly situated,

Petitioners,

v.

CITY OF CHICAGO,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a District Court violates a parties Fourteenth Amendment right to due process of law when, in its application of the rational basis test to an age discrimination claim under the Equal Protection Clause of the Fourteenth Amendment, the District Court, *sua sponte* hypothesizes rational bases which were never argued by any party, were never discussed at any legislative hearing and which were never adopted by the city council as a basis for the legislation which reduced the existing retirement age.

Whether the Illinois Constitution and the Illinois Human Rights Statutes superseded the City of Chicago's local ordinances concerning the retirement age for policemen as of March 3, 1983.

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IN THE

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WILLIAM A. McCANN, GEORGE J. MARCIN, THOMAS P. McGADY, AUGUST R. LOCALLO, JAMES R. HUTTON, MICHAEL J. CONNOLLY, ROBERT S. VETROVEC, WILLIAM J. DUFFY, CALDRON MANNS, ANTHONY PALKA, JOHN GRIFFITH, WILLIAM BRANSFIELD, JAMES P. MOSS, ERNEST K. TAYLOR, KENNETH BROOKS, individually and on behalf of all others similarly situated,

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The Petitioners, William A. McCann, George J. Marcin, Thomas P. McGady, August R. Locallo, James R. Hutton, Michael J. Connolly, Robert S. Vetrovec, William J. Duffy, Caldron Manns, Anthony Palka, John Griffith, William Bransfield, James P. Moss, Ernest K. Taylor, Kenneth Brooks, individually and on behalf of all others similarly situated, respectfully request that a Writ of Certiorari issue to review the opinions of the Seventh Circuit Court of Appeals and the United States District Court for the Northern District of Illinois, Eastern Division, issued in the above-entitled proceedings.

OPINIONS BELOW

The July 8, 1992 Opinion of the Seventh Circuit Court of Appeals, *McCann v. City of Chicago*, Nos. 91-3261 and 91-3267 Consolidated, and the unpublished December 19, 1990 and August 7, 1991 Memorandum Opinions of the District Court for the Northern District of Illinois, Eastern Division are printed in the Appendix hereto.

JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit in this matter was entered on July 8, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254.

RELEVANT STATUTES AND ORDINANCES

The pertinent sections of the following statutes and ordinances are set forth below:

29 U.S.C. Sec. 623

§ 623. Prohibition of age discrimination

* * * * *

(j) Firefighters and law enforcement officers attaining hiring or retiring age under State or local law on March 3, 1983

It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken—

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer and the individual has attained the age of hiring or retirement in effect under applicable State or local law on March 3, 1983, and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.

* * * * *

Constitution of the State of Illinois, Article I, Sec. 17

§ 17. No Discrimination in Employment and the Sale or Rental of Property

All persons shall have the right to be free from discrimination on the basis of race, color, creed, national ancestry and sex in the hiring and promotion practices of any employer or in the sale or rental of property.

These rights are enforceable without action by the General Assembly, but the General Assembly by law may establish reasonable exemptions relating to these rights and provide additional remedies for their violation.

Ill.Rev.Stat., Ch. 68, Sec. 1-102, *et seq.*

1-102. Declaration of policy

§ 1-102. Declaration of Policy. It is the public policy of this State:

(A) Freedom from Unlawful Discrimination. To secure for all individuals within Illinois the freedom from discrimination because of race, color, religion, sex, national origin, ancestry, age, marital status, physical or mental handicap, or unfavorable discharge from military service in connection with employment, real estate transactions, access to financial credit, and the availability of public accommodations.

1-103. General definitions

§ 1-103. General Definitions. When used in this Act, unless the context requires otherwise, the term:

(A) Age. "Age" means the chronological age of a person who is at least 40 years old, except with regard to any practice described in Section 2-102, insofar as that practice concerns training or apprenticeship programs. In the case of training or apprenticeship programs, for the purposes of Section 2-102, "age" means the chronological age of a person who is 18 but not yet 40 years old.

2-102. Civil rights violations—Employment

§ 2-102. Civil Rights Violations—Employment. It is a civil rights violation:

(A) Employers. For any employer to refuse to hire, to segregate, or to act with respect to recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure or terms, privileges or conditions of employment on the basis of unlawful discrimination or citizenship status.

2-104. Exemptions

§ 2-104. Exemptions. (A) Nothing contained in this Act shall prohibit an employer, employment agency or labor organization from:

(7) Police and Firefighter Retirement. Imposing a mandatory retirement age for firefighters or law enforcement officers if prior to December 31, 1993, the law enforcement officer or firefighter has attained the age of retirement in effect under applicable state or local law on March 3, 1983 and if such retirement action is taken pursuant to a bona fide retirement plan. This paragraph (7) shall not apply with respect to any cause of action arising under the Illinois Human Rights Act as in effect prior to December 3, 1987 (the effective date of Public Act 85-949).

Ill.Rev.Stat., Ch. 24, Sec. 10-1-18, *et seq.*

10-1-18. Removal—Suspension—Retirement

(c) Whenever the corporate authorities of any municipality in which this Division 1 is in operation, designates by ordinance or whenever any general law of this state designates any specific age of not less than 63 years as the maximum age for legal employment of policemen or firemen in the service of any municipality which has adopted or shall adopt this Division 1 or designates any minimum age for the automatic or compulsory retirement of policemen or firemen in the service of that municipality, any such policeman or fireman to whom such ordinance or law may refer or apply upon attaining the designated age of 63 years or upwards as set out in the ordinance or law shall forthwith and immediately be retired from the service of that municipality in accordance with the terms or provisions of that ordinance or law. The civil service commission of the municipality shall discharge or retire automatically any policeman or fireman in the classified civil service of the municipality at the time and in the manner provided in that ordinance or law and certify the retirement or discharge to the proper branch or department head. In the case of any such policeman or fireman who has filed an application for appointment in the classified civil service of the municipality, the age stated in that application shall be conclusive evidence against that policeman or fireman of his age, but the civil service commission (except as respects police department officers and employees in municipalities of more than 500,000 population where the Police Board shall exercise these powers as provided in Section 10-1-18.1) may hear testimony and consider all evidence available in any case in which any charge is filed against any such policeman or fireman alleging that he understated his age in his application for appointment into the classified civil service of the municipality.

In addition to all the other powers now granted by law, the corporate authorities of any municipality which has

adopted or shall adopt this Division 1 may by ordinance provide an age limit of not less than 63 years as the maximum age for the legal employment of any person employed as a policeman or fireman under this Division 1, and may provide in that ordinance for the automatic or compulsory retirement and discharge of the policeman or fireman upon his attainment of the designated retirement age.

Municipal Code of Chicago, Illinois,
Ch. 25, Sec. 37 (as amended) (1988)

SUBSTITUTE ORDINANCE

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF CHICAGO:

SECTION 1. Chapter 25, Section 37 of the Municipal Code is hereby amended by deleting the language bracketed and adding the language in italics as follows:

25-37. The age of [seventy] *sixty-three* years shall be the maximum age for legal employment of sworn members of the Police Department and members of the uniformed service of the Fire Department [in the classified career service of the City]. Every sworn member[s] of the Police Department and every member of the uniformed service of the Fire Department [in the classified career service of the City] who has attained the age of [seventy] *sixty-three* years *prior to December 31, 1993*, shall forthwith and immediately be retired from service. [No sworn member of the Police Department or member of the uniformed service of the Fire Department shall be subject to mandatory retirement based on age before attaining the age of seventy, except where the Commissioner of Personnel, in conjunction with the Fire Commissioner or the Police Superintendent and after consultation with members of the City Council Committee on Police, Fire, and Municipal Institutions and the City Council Committee on Administration, Reorganization, and Personnel, determines for a particular title or classification that age is a bona fide occupational qualification reasonably necessary to the

normal operation of the Department in which the individual is employed. Nothing in this Section shall preclude the Departments of Police and Fire from maintaining, revising, or establishing additional performance standards, based on factors other than age, for all sworn members of the Police Department and all members of the uniformed service of the Fire Department, which standards must be met in order for sworn members of the Police Department and members of the uniformed service of the Fire Department to remain in the active service of these Departments, the health, welfare, and safety of the public requiring the same.]

* * * * *

Municipal Code of Chicago, Illinois,
Ch. 25, Sec. 37 (1983)

ORDINANCE

WHEREAS, present Section 25-37 of the Municipal Code of Chicago provides for the mandatory retirement of policemen and firemen upon attaining the age of sixty-three, and

WHEREAS, the public policy on both the federal and state level as expressed in statutes provides that mandatory retirement before the age of seventy may not be based solely on age, except where such is a bona fide occupational qualification, and

WHEREAS, the Mayor, the City Council and other citizens of the City of Chicago desire to adopt this policy for the sworn members of the Police Department and the members of the uniformed service of the Fire Department, subject to the requirements of the public health, safety, and welfare, now therefore,

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF CHICAGO

SECTION 1. Section 25-37 of the Municipal Code is hereby amended by deleting the language bracketed and adding the language underscored (italicized), as follows:

25-37. The age of [sixty-three] *seventy* years shall be the maximum age for legal employment of [policemen and firemen] *sworn members of the Police Department and members of the uniformed service of the Fire Department* in the classified [civil] *career* service of the city. Every [policeman and every fireman] *sworn member of the Police Department and every member of the uniformed service of the Fire Department* in the classified [civil] *career* service of the city who has attained the age of [sixty-three] *seventy* years shall forthwith and immediately be retired from service. *No sworn member of the Police Department or member of the uniformed service of the Fire Department shall be subject to mandatory retirement based on age before attaining the age of seventy, except where the Commissioner of Personnel, in conjunction with the Fire Commissioner or the Police Superintendent and after consultation with members of the City Council Committee on Police, Fire, and Municipal Institutions and the City Council Committee on Administration, Reorganization, and Personnel, determines for a particular title or classification that age is a bona fide occupational qualification reasonably necessary to the normal operation of the Department in which the individual is employed. Nothing in this Section shall preclude the Department of Police and Fire from maintaining, revising, or establishing additional performance standards, based on factors other than age, for all sworn members of the Police Department and all members of the uniformed service of the Fire Department, which standards must be met in order for sworn members of the Police Department and members of the uniformed service of the Fire Department to remain in the active service of these Departments, the health, welfare, and safety of the public requring the same.*

* * * * *

Municipal Code of Chicago, Illinois,
Ch. 25, Sec. 37 (1980)

Retirement of policemen and firemen

25-37. The age of sixty-three shall be the maximum age for legal employment of policemen and firemen in the classified civil service of the city. Every policeman and every fireman in the classified civil service of the city who has attained the age of sixty-three shall forthwith and immediately be retired from service.

STATEMENT OF THE CASE

The members of the Petitioner class were sworn, non-union members of the Chicago Police Department who were retired mandatorily from the Police Department between March 1, 1988 and February 7, 1990, because they were age 63 or older. The members of the Petitioner class held the rank of Sergeant or above at all times from December 31, 1987 through their retirement.

On March 3, 1983, this Court held that the extension of the Age Discrimination in Employment Act ("ADEA") to municipalities was constitutional. *EEOC v. Wyoming*, 460 U.S. 226 (1983). At that time, the ADEA prohibited the mandatory retirement of persons under age 70, 29 U.S.C. Sec. 623(a)(1), unless the employer could demonstrate that age was a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. Sec. 623(f)(2).

In 1986, Congress amended the ADEA to state that:

> "[i]t shall not be unlawful for an employer which is a State (or) a political subdivision of a State . . . to discharge any individual because of such individual's age if such action is taken (1) with respect to the employment of an individual as a firefighter or as a

> law enforcement officer and the individual has attained the age of hiring or retirement in effect under applicable State or local law on March 3, 1983, and (2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter."

29 U.S.C. Sec. 623(i). By Chicago City Ordinance, the mandatory retirement age for Chicago police officers on March 3, 1983 was 63. The amended Act delayed its effectiveness for City employees who had entered into collective bargaining agreements that were in effect on June 30, 1986. The Act stated that "such amendments shall not apply until the termination of such collective bargaining agreement or January 1, 1990, whichever comes first." Age Discrimination in Employment Act Amendments of 1986, Pub. L. 99-592, Sec. 7.

At all times relevant to this case, employment of all sworn police officers below the rank of sergeant was governed by a collective bargaining agreement between the City of Chicago and the Fraternal Order of Police, Chicago Lodge Number 7, effective January 6, 1986 ("the 1986 Agreement"). The 1986 Agreement prohibited discrimination on the basis of age against officers below the rank of sergeant who were between the ages of 40 and 70.

The 1986 Agreement continued in effect until February 7, 1990 when the Chicago City Council ratified a new agreement between the City and the Fraternal Order of Police. The 1990 agreement established a mandatory retirement age of 63 for sworn police officers below the rank of sergeant.

On January 31, 1988, the City of Chicago enacted a municipal ordinance which lowered the retirement age for all sworn police personnel from 70 to 63 years of age.

Municipal Code of Chicago, Illinois, Ch. 25, Sec. 37 (as amended) (1988); *Compare* Municipal Code of Chicago, Illinois, Ch. 25, Sec. 37 (1983). Because of the exemption under the amendments to the ADEA, the retirement age for police officers protected by the collective bargaining agreement remained at 70 until 1990.

As a result of the combined effect of the 1988 Ordinance and the 1986 collective bargaining agreement, from March 1988 to January 1990, there was a discrepancy of seven years between the mandatory retirement age of police officers with ranks of sergeant and above (63 years) and that of police officers below the rank of sergeant (70 years).

Prior to the enactment of the 1988 Mandatory Retirement Ordinance, the benefits arising under the collective bargaining agreement, including the mandatory retirement age, had been automatically extended to the ranks above sergeant by the custom and practice of the City. Despite its earlier custom and practice, the City refused to continue the custom and practice and to extend the 70 year mandatory retirement age to the ranks above sergeant until such time that a new collective bargaining agreement was signed. Starting in early 1988, the City started enforcing the 63 year old mandatory retirement age against the police personnel above the rank of Sergeant. Police officers below the rank of Sergeant who were between the ages of 63 and 70 were not forced to retire between 1988 and 1990.

In the summary judgment pleadings, the City of Chicago consistently identified its rational basis for not applying the Mandatory Retirement Ordinance to sworn members of the Police Department below the rank of sergeant by maintaining that the Union Contract "prohibited the mandatory retirement of sworn members be-

low the rank of sergeant." The District Court's August 7, 1991 Order found that the fact "that the ADEA allowed the City to act does not alone provide a rational basis for the decision to act." The District Court then hypothesized two rational bases to sustain the City Ordinance even though the City did not proffer those reasons and even though the facts demonstrated that the Chicago City Council never considered those rational bases.

The Seventh Circuit Court of Appeals had jurisdiction over this matter pursuant to 28 U.S.C. Sec. 1291 in that the appeal was from a final judgment.

The Seventh Circuit Court of Appeals affirmed the District Court's decisions in favor of the City of Chicago and found that the City's actions did not violate the Equal Protection Clause of the Fourteenth Amendment and that the City of Chicago Ordinance was not superseded by the age discrimination provisions of the Illinois Human Rights Act.

REASONS FOR GRANTING THE WRIT

A.

THE DISTRICT COURT'S HYPOTHETICAL RATIONAL BASES WHICH WERE AFFIRMED BY THE SEVENTH CIRCUIT DENIED THE PETITIONERS DUE PROCESS OF LAW.

In the District Court's August 7, 1991 Order, the Court found that the City's proffered basis for the 1988 Ordinance (e.g., that the 1986 ADEA amendments provided the rational basis for the 1988 Ordinance), did "not alone provide a rational basis for the decision to act."

The City had consistently and repeatedly stated that the 1986 ADEA amendments were the *only* basis sup-

porting the disparate treatment between the Petitioners and the police officers covered by the FOP union contract (hereinafter "FOP officers"). During the briefing on its Motions to Dismiss and for Summary Judgment, the City never once suggested that the disparate treatment of the Plaintiffs related to "a concern over the ability of police officers over the age of 63 to meet the physical demands of the job and the safety of the community they were to protect"[1] or to an attempt "to retire as many police officers at the age of 63, . . . [being] limited to the extent that some police officers were protected by the collective bargaining agreement", (*See* Appendix pp. 18-24), or "a public-spirited effort to protect expectation interests" or "an economic tradeoff between salary and benefits" or "a sop to an interest group possessing the power to block a larger step." (*See* Appendix pp. 1-7)

The rational bases found by the District Court and the Seventh Circuit Court were never an issue between the parties or a rational basis proffered by the City until the respective Courts rendered their opinions. The District Court interpreted the language in *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 179 (1980), as allowing the Court to merely hypothesize any plausible reason to support the statute, even though the City never

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[1] In response to a request by the EEOC, the Center for Applied Behavioral Sciences at Penn State completed a report on January 31, 1992 which recommended that the exemption of public safety officers from the provisions of the 1986 ADEA Amendments (29 U.S.C. sec. 623, *et seq.*) be eliminated and that these occupations be treated like all others covered by the ADEA. In sum, the study found that chronological age should not be considered alone when it comes to retirement decisions. *Alternatives To Chronological Age In Determining Standards Of Suitability For Public Safety Jobs*, Pennsylvania State University Center for Applied Behavioral Sciences, January 31, 1992.

asserted the reason in its pleadings and even though the Chicago City Council never considered the reason when it passed the Ordinance. The Seventh Circuit interpreted the language in *Vance v. Bradley*, 440 U.S. 93 (1979), as also permitting this hypothetical power. The District Court's and the Seventh Circuit's interpretations of this hypothetical power of broad review was simply too expansive.

The clear import of the case law relied upon by the District Court and Seventh Circuit which allows a court to "hypothesize plausible reasons" is that a court is allowed to find a valid rational basis from the reasons proffered by the litigant defending the statute *even though* that particular reason or those particular rationales were never debated or considered by the legislature when it enacted the legislation. *See Brown v. City of Lake Geneva*, 919 F.2d 1299, 1302 (7th Cir., 1990) ("we must accept any justification the *legislature* offers for its actions.") [Emphasis added] *Compare Shaw v. State of Oregon Public Employment Retirement Board*, 887 F.2d 947 (9th Cir., 1989) (Stated rational basis: additional compensation for police and firefighters' shorter working life); *Peterson v. Lindner*, 765 F.2d 698, 708 (7th Cir., 1985); and *Sklar v. Byrne*, 727 F.2d 633, 641 (7th Cir., 1984).

It would deny all concepts of fundamental fairness and due process of law if a court were allowed to go outside of the record by judicial *fiat* and determine the rights of the parties when the particular rational basis found by the Court has never been presented or even suggested to the Court by the defending municipality.

The equal protection issue presented here should be analyzed in the same regard as the application of two conflicting laws to similarly situated persons. *Compare Davis v. Village of Newburgh Heights*, 642 F.Supp. 413, 415

(M.D. Pa., 1986); and *Miller v. Carter*, 547 F.2d 1314, 1316 (7th Cir., 1977). The application of conflicting laws to similarly situated persons represents a classic equal protection violation. The application of the 1988 Ordinance to the Petitioner class and the application of the FOP union contract ordinance to lower ranked, union member, sworn personnel was such a violation. The rational bases hypothesized by the District Court and the Seventh Circuit "could not reasonably be conceived to be true by the governmental decisionmaker." *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 463 (1987).

In all of the cases cited by the District Court in its August 7, 1991 Memorandum and in the Seventh Circuit's, each respective Court was presented at least one, if not several, rational bases in support of the challenged Ordinance. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312 (1975); *Evans v. City of Chicago*, 873 F.2d 1007, 1016 (7th Cir., 1989); *Fritz, supra*; *Gregory v. Ashcroft*, 111 S.Ct. 2395 (1991); *Pontarelli Limousine, Inc. v. City of Chicago*, 929 F.2d 339 (7th Cir., 1991); and *Dandridge v. Williams*, 397 U.S. 471 (1970)). In the instant case, the one rational basis proffered by the City (the ADEA amendments) was found to not have provided the City with a rational basis for its decision to act.

The Seventh Circuit Court of Appeals found that Petitioners' equal protection argument was foreclosed by this Court's decision in *Vance v. Bradley*, 440 U.S. 93 (1979). *Vance*, however, does not preclude the Petitioners' equal protection argument.

In *Vance*, the appellants proffered various rationales in support of the variance in the treatment of two groups in the Foreign Service. *Id.* 440 U.S. at 97-98. The appellees did not dispute the validity of the proffered goals. *Id.*

In the instant case, the City of Chicago only proffered one rationale which the District Court found did not provide a rational basis for the ordinance. The additional rational bases were provided, *sua sponte*, by the District Court and the Seventh Circuit. The Petitioners proved to the District Court that the City's proffered rational basis "could not reasonably be conceived to be true by the governmental decisionmaker." *Id.* 440 U.S. at 111. The District Court, in fact, found that the City's proffered rational basis did not "alone provide a rational basis for the decision to act." Since the appellants in *Vance* identified various rational bases to the Court, *Vance* is distinguishable from the instant case where the only rational basis advanced by the City was rejected by the District Court.

"The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 446 (1985). Without the District Court's and the Seventh Circuit's hypothetical bases, the District Court's August 7, 1991 Order found that the City did *not* have a "rational basis for the decision to act."

As such, the Petitioners respectfully request that this Court grant a Petition For Writ Of Certiorari to the United States Court of Appeals for the Seventh Circuit.

B.

THE PROHIBITION AGAINST AGE DISCRIMINATION PROVISIONS OF THE ILLINOIS CONSTITUTION AND THE ILLINOIS HUMAN RIGHTS ACT SUPERSEDED THE CITY OF CHICAGO'S LOCAL ORDINANCE CONCERNING THE RETIREMENT AGE OF POLICEMEN AS OF MARCH 3, 1983.

The District Court and the Seventh Circuit determined that Chicago's local ordinance in existence on March 3,

1983, which required retirement at age 63, took precedence over conflicting State statutes which provided that age 70 was the minimum retirement age. The Petitioners submit that the provisions of the Illinois Constitution and Illinois Human Rights Act ("IHRA"), Ill.Rev.Stat., Ch. 68, Sec. 1-102(A), should prevail over the provisions of the Illinois Municipal Code ("The Code"), Ill.Rev.Stat., Ch. 24, Sec. 10-1-18(c), and the City of Chicago's local ordinance.

In *State v. Mikusch*, 138 Ill.2d 242, 562 N.E.2d 168 (1990), the Illinois Supreme Court found that:

> The Human Rights Act is directed to problems of discrimination and is clearly more specific on the issue of age discrimination than the Vehicle Code and the Pension Code. The [Human Rights] Act's terms should control.

Mikusch, 562 N.E.2d at 173. The Illinois Supreme Court's holding that the IHRA age discrimination provisions prevail over conflicting legislation was consistent with the holdings in earlier Illinois cases which upheld the IHRA's superiority over other statutes conflicting with the 70-year age provisions of the IHRA. *See Board of Trustees of Community College District v. The Human Rights Commission*, 88 Ill.2d 22, 429 N.E.2d 1207 (1981); *Hutchcraft Van Service, Inc. v. City of Urbana Human Relations Commission*, 104 Ill.App.3d 817, 433 N.E.2d 329 (4th Dist., 1982) (IHRA preempts the subject of freedom from unlawful discrimination); *Thakkar v. Wilson Enterprises, Inc.*, 120 Ill.App.3d 878, 458 N.E.2d 985 (1st Dist., 1983).

The reasoning and rationale of *Mikusch*, *Board of Trustees*, *Hutchcraft* and *Thakkar* were consistent with the holdings of other Illinois Court decisions that found that the IHRA was the exclusive mechanism for enforcement of rights concerning discrimination as guaranteed by the State Constitution. *Bismarck Hotel v. Sutherland*, 175

Ill.App.3d 739, 529 N.E.2d 1091, 1099 (1st Dist., 1988); and that where the subject of legislation is of statewide concern, no local governmental unit, even a home rule unit, has the authority to adopt a different statutory scheme from the State's legislative enactments. *See* e.g. *People's Gas v. City of Chicago*, 125 Ill.App.3d 95, 465 N.E.2d 603 (1st Dist., 1984); *County of Cook v. John Sexton Contractors Co.*, 75 Ill.2d 494, 389 N.E.2d 553 (1979); *But see*, *Crain Enterprises, Inc. v. City of Mound City*, 189 Ill. App.3d 130, 544 N.E.2d 1329 (5th Dist., 1989); and *Compare Ampersand v. Finley*, 61 Ill.2d 537, 338 N.E.2d 15 (1975).

Article I, Section 17 of the Illinois State Constitution prohibits discrimination in employment. That broad constitutional mandate was codified in the IHRA. Ill.Rev. Stat., Ch. 68, Sec. 1-102, *et seq.* The codification of the State's constitutional provision against unlawful employment discrimination in the IHRA indicates that unlawful discrimination is a matter of statewide concern that cannot be abrogated or superseded by local ordinance, even one enacted by a home rule municipality.

In *Jirus v. City of Berwyn*, 712 F.Supp. 672, 677-678 (N.D. Ill., 1989), the District Court found that the IHRA, in March, 1983, prohibited employers from adopting mandatory retirement ages of less than 70. Under *Mikusch* and the other Illinois precedents noted above, the IHRA represents the State's definitive policy on discrimination and should supersede the provisions of the Illinois Municipal Code and the City of Chicago's local ordinance which permitted the lowering of the mandatory retirement age to 63. Under the holding of *Mikusch*, the District Court and Seventh Circuit should have found that the IHRA superseded the relevant sections of the Municipal Code. Since the IHRA set statewide standards regarding unlaw-

ful discrimination, the IHRA also supersedes Chicago's municipal ordinance which lowered the mandatory retirement age to 63.

The age 70 provisions of the IHRA were in effect on March 3, 1983 and those provisions of the IHRA should have been applied to the Petitioners herein.

The Seventh Circuit's determination that the provisions of the IHRA did not supersede Chicago's local ordinance regarding the applicable mandatory retirement age is contrary to the law of the State of Illinois in existence on March 3, 1983.

As such, the Petitioners respectfully request that this Court grant a Petition For Writ Of Certiorari to the United States Court of Appeals for the Seventh Circuit.

CONCLUSION

For all of the foregoing reasons, the Petitioner class respectfully requests that this Court grant a Petition For Writ Of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 91-3261 and 91-3267

WILLIAM A. MCCANN, *et al.*,

Plaintiffs-Appellants,

v.

CITY OF CHICAGO, *et al.*,

Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 89 C 2879 and 90 C 464—**John F. Grady**, *Judge.*

ARGUED MAY 29, 1992—DECIDED JULY 8, 1992

Before CUDAHY, EASTERBROOK, and RIPPLE, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* For many years, Chicago retired members of its police force at 63. That changed when the Supreme Court held, in *EEOC v. Wyoming*, 460 U.S. 226 (1983), that the Age Discrimination in Employment Act applies to state law enforcement officials. Chicago's retirement age rose from 63 to 70, and city halls throughout the nation rose in protest. Eventually they procured a change in the law.

In 1986 Congress amended the ADEA to permit state and local governments to restore the mandatory retirement

ages that had been in place on March 3, 1983, the day after the Supreme Court handed down *EEOC v. Wyoming*:

> It shall not be unlawful for an employer which is a State [or] a political subdivision of a State . . . to discharge any individual because of such individual's age if such action is taken (1) with respect to the employment of an individual as a firefighter or as a law enforcement officer and the individual has attained the age of hiring or retirement in effect under applicable State or local law on March 3, 1983, and (2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.

29 U.S.C. §623(j). This legislation shows the signs of compromise. Any law enforcement officer covered by a collective-bargaining agreement in effect on June 30, 1986, that specified a higher retirement age could stick around until that age, "the termination of such collective bargaining agreement or January 1, 1990, whichever occurs first." Section 7 of Pub. L. 99-592, 100 Stat. 3344-45 (1986). Section 623(j) faces a sunset in 1993.

Section 623(j) moved the locus of the battle from Washington, D.C., to state and city governments. Illinois enacted a statute permitting cities to restore the rules that were in effect on March 3, 1983. Ill. Rev. Stat. ch. 68 ¶2-104(A)(7). In January 1988, after still another political contest, Chicago enacted an ordinance taking advantage of its renewed control over retirement ages. It reinstituted the mandatory retirement age of 63 for all members of the police force. Early in 1986, however, Chicago and the Fraternal Order of Police reached a collective bargaining agreement covering all officers below the rank of sergeant. This agreement barred mandatory retirement before 70. Under the proviso to the 1986 amendment, Chicago could not reduce the retirement age of these officers until January 1, 1990. Thus during 1988 and 1989 only sergeants and higher ranks had to leave at age 63. In this class action the police officers contend that the difference in re-

tirement ages for these two years violates both the ADEA and the equal protection clause of the fourteenth amendment. The district court disagreed and granted summary judgment to the defendants. Plaintiffs have abandoned in this court any argument that the restoration of a retirement age that predated the ADEA is a "subterfuge" for purposes of §623(j)(2). See *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 168 (1989); *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 203 (1977).

Between 1980 and 1987 the Illinois Human Rights Act, which applies to private and public employers, forbade mandatory retirement before the age of 70. Ill. Rev. Stat. ch. 68 ¶2-102(A). (An amendment in 1987 apparently forbids mandatory retirement at any age.) Plaintiffs submit that the "age of . . . retirement in effect under applicable State or local law on March 3, 1983" was accordingly 70. One district judge has agreed. *Jirus v. Berwyn*, 712 F. Supp. 672 (N.D. Ill. 1989). Chicago replies that the Human Rights Act does not govern because the Illinois Municipal Code, Ill. Rev. Stat. ch. 24 ¶10-1-18(c), authorizes cities to compel law enforcement officials to retire at age 63. Yet *State v. Mikusch*, 138 Ill. 2d 242, 562 N.E.2d 168 (1990), casts substantial doubt on this approach, for it holds that the Human Rights Act displaces part of the state's Vehicle Code separating state vehicle investigators from office at age 60. Ill. Rev. Stat. ch. 95½ ¶2-115. We called for supplemental briefs after argument on the effect of *Mikusch*, which neither party had discussed.

Chicago contends that youth is a bona fide occupational qualification for police, permitting retirement at 63 even if the Human Rights Act applies. If this is so, however, then Chicago could have maintained its retirement system without change after *EEOC v. Wyoming*, for the federal statute also has a BFOQ exception. 29 U.S.C. §623(f)(1). In both federal and state law, however, this defense "is written narrowly, and [the Supreme] Court has read it narrowly." *United Auto Workers v. Johnson Controls, Inc.*, 111 S. Ct. 1196, 1204 (1991). In its current state,

the record does not support summary judgment for the City on this ground. So we must consider Chicago's alternative argument that the language of the Municipal Code, in conjunction with another statute providing that no state law enacted after January 12, 1977, regulates home-rule jurisdictions (of which Chicago is one) unless the state legislature expressly so provides, Ill. Rev. Stat. ch. 1 ¶1106, permits the City to disregard ¶2-102(A).

The Municipal Code does not set 63 as a mandatory age of retirement. Instead it delegates to municipalities the power to set a retirement age, provided they choose 63 or older. The Human Rights Act does not "conflict" with delegation in the same direct way it superseded the retirement age in the Vehicle Code. Does ¶2-102(A) undo the delegation of power? It does not address the question. Two considerations lead us to conclude that it does not. First is the rule of construction in ¶1106 that only express impingements on home-rule jurisdictions affect cities' powers. The Human Rights Act withdraws home-rule powers concerning housing discrimination, Ill. Rev. Stat. ch. 68 ¶7-108(D), but contains nothing comparable concerning age discrimination. Second is the statute Illinois enacted in 1987, Ill. Rev. Stat. ch. 68 ¶2-104(A)(7), permitting cities to take advantage of §623(j). The 1987 legislation would be hollow if the rules in force in 1983 forbade mandatory retirement earlier than 70. Chicago's ordinance restoring the mandatory retirement age of 63 therefore is consistent with the ADEA.

Age is neither a suspect classification nor otherwise a basis for requiring states to supply an enhanced justification for their laws. *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2406-08 (1991); *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 441 (1985); *Vance v. Bradley*, 440 U.S. 93 (1979); *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976). After *Murgia*, which held that a state may compel police to retire at 50, there can be no doubt that the Constitution permits Chicago to select 63 as a cap. Plaintiffs challenge not the particular age of retire-

ment but treating sergeants (and above) differently from patrol officers.

Chicago has a rational basis for the difference. It did what it could to set a low age for everyone, but the proviso to §623(j) delayed its implementation for officers covered by the collective bargaining agreement. True enough, Chicago could have waited until 1990 to move the retirement age for everyone, but that would have frustrated achievement of its choice of age 63, a choice the Constitution allows it to make. So the question becomes whether the proviso to §623(j) is constitutional.

Grandfather clauses—laws that like the proviso curtail the application of new rules to existing entitlements—protect expectation interests, which is enough to make them rational and so defeat challenge under the equal protection clause. *Nordlinger v. Hahn*, 60 U.S.L.W. 4563 (U.S. June 18, 1992); *New Orleans v. Dukes*, 427 U.S. 297 (1976). Because a collective bargaining agreement is a contract, this particular expectation has the sanction of the contracts clause, Art. I §10 cl. 1, behind it. It cannot violate the equal protection clause to recognize entitlements under contract, which by definition differentiate signatories from bystanders. Lieutenants lack the retirement-age benefit of the collective bargaining agreements, but they receive pay higher than officers who walk the beat. We doubt that the captains believe that their salaries violate the equal protection clause! Chicago extended different packages of duties, pay, and fringe benefits to the different classes of police officers. It is no more questionable to have different retirement ages for these groups than to have different medical benefits packages.

Plaintiffs' entire line of argument is foreclosed by *Vance v. Bradley*, a case they did not bother to cite. A district court distinguished *Murgia* by observing that some of the State Department's personnel stationed overseas are in the Foreign Service System (mandatory retirement at 60) while others are in the Civil Service System (mandatory retirement at 70). This difference was unjustified, the court

thought. The Supreme Court reversed, holding that the disparate packages of wages and benefits in the two systems needed no special justification. Higher wages may offset earlier retirement. 440 U.S. at 109. The Court added that the foreign service is supposed to be an elite corps, justifying earlier retirement to protect the vigor of the group and create opportunities for advancement. Exactly the same may be said in support of earlier retirement for the more senior officers of a police force. And it matters not that the record contains no evidence on the point. As the Court stressed, under the rational basis fork of equal protection analysis, the question is what a legislature *could have* concluded, and not what a judge believes after taking evidence. 440 U.S. at 110-12. See also, e.g., *Northside Sanitary Landfill, Inc. v. Indianapolis*, 902 F.2d 521 (7th Cir. 1990); *Pontarelli Limousine, Inc. v. Chicago*, 929 F.2d 339 (7th Cir. 1991).

Instead of understanding the proviso as a way to achieve public benefits, we might see it as a concession to a powerful interest group. Legislation often is possible only if enemies can be assuaged by concessions that have no principle beyond the virtue of necessity. Interest-group influence is no news; Madison's *Federalist No. 10* is all about the power of faction and how a federal government may ameliorate (though not overcome) this bane. If interest-group exceptions to general laws vitiate the entire law there might be fewer exceptions, but more likely there would be fewer statutes, including some in which the special interests won everything rather than settling for partial victories. Cases holding that a legislature may take one step at a time, addressing part of a subject while leaving identical problems outside the law, tolerate interest-group influence in politics. E.g., *Bowen v. Owens*, 476 U.S. 340, 347 (1986); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955). Cf. *Central States Pension Fund v. Lady Baltimore Foods, Inc.*, 960 F.2d 1339, 1342-44 (7th Cir. 1992).

Whether the difference in retirement ages is a public-spirited effort to protect expectation interests, an eco-

nomic tradeoff between salary and benefits, or a sop to an interest group possessing the power to block a larger step, in the end makes no difference. Each of these understandings supplies a rational basis for the proviso to §623(j), which permits Chicago to proceed as it did.

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT—WITH ORAL ARGUMENT

Date: July 8, 1992

BEFORE:
Honorable RICHARD D. CUDAHY, Circuit Judge
Honorable FRANK H. EASTERBROOK, Circuit Judge
Honorable KENNETH F. RIPPLE, Circuit Judge

Nos. 91-3261 & 91-3267

WILLIAM A. MCCANN, GEORGE J. MARCIN, THOMAS P. MCGADY, et al.,

Plaintiffs-Appellants

v.

CITY OF CHICAGO and POLICEMAN'S ANNUITY & BENEFIT FUND OF THE CITY OF CHICAGO,

Defendants-Appellees

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division
No. 89 C 2879, Judge John F. Grady

These causes were heard on the record from the above mentioned District Court, and were argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this court that the judgments of the District Court are AFFIRMED, with costs, in accordance with the decisions of this court entered this date.

(1061-030690)

[Dated December 19, 1990]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WILLIAM A. McCANN, et al.,	)	
	)	
Plaintiffs,	)	
	)	No. 89 C 2879
	)	CONSOLIDATED
v.	)	WITH
	)	90 C 0464
CITY OF CHICAGO, a municipal corporation, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

This age discrimination case is before us on our request for additional briefing regarding the impact, if any, of *Jirus v. City of Berwyn*, 712 F. Supp. 672 (N.D. Ill. 1989), on our May 3, 1990, memorandum opinion dismissing plaintiff's age discrimination claims under the Age Discrimination in Employment Act ("ADEA"). In our May 3, 1990, opinion, we observed that the 1986 amendments to the ADEA allowed the City of Chicago ("Chicago") to use a retirement plan for law enforcement officers which was in effect on March 3, 1983, and found that the plan under which Chicago mandatorily retired plaintiffs at age 63 was merely a reenactment of the plan that was in effect on March 3, 1983.

In *Jirus*, Judge James B. Moran held that the relevant retirement law in effect in Illinois on March 3, 1983, was the Illinois Human Rights Act ("IHRA") which rendered mandatory retirement below the age of 70 impermissible.

Judge Moran held that the IHRA, as it existed on March 3, 1983 ("1983 IHRA"), preempted and effectively repealed the City of Berwyn's ordinance which specified mandatory retirement at age 60 for its police officers and firefighters. The question before us, therefore, is whether the 1983 IHRA preempted Chicago's 1983 mandatory retirement plan ("plan" or "ordinance") and thus rendered it void as of March 3, 1983. For the reasons stated below, we find that the 1983 IHRA did not preempt Chicago's 1983 plan and therefore, we leave undisturbed our May 3, 1990, opinion dismissing Count I.

DISCUSSION

The City of Chicago is a home rule jurisdiction and "[h]ome rule units may exercise concurrently with the state any power of a home rule unit to the extent that the General Assembly does not specifically limit the concurrent exercise or specifically declare the state's exercise to be exclusive." Ill. Const. art. VII, § 6(i). With certain exceptions not relevant to our discussion, "[a] home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare." *Id.* § 6(a). In *Hutchcraft Van Serv. v. City of Urbana, etc.*, 104 Ill. App. 3d 817, 824, 433 N.E.2d 329, 334 (4th Dist. 1982), the court held that by enacting the IHRA the legislature established such a comprehensive statutory scheme as to show its intent to preempt the subject of freedom from unlawful discrimination and that "insofar as the [City of Urbana's] ordinance attempts a broader scope than that set forth in [the IHRA], it is not permissible." The legislature amended the IHRA in response to *Hutchcraft*, and provided: "The provisions of any ordinance enacted by any municipality

or county which prohibits *broader or different categories* of discrimination than are prohibited by this Act are not invalidated or affected by this Act." Ill. Rev. Stat. ch. 68, ¶ 7-108(a) (emphasis added). Thus, Chicago can exercise concurrent jurisdiction with the state in prohibiting discrimination, at least with respect to prohibiting broader or different categories of discrimination.

The problem before us, however, does not involve a retirement plan that provides broader relief against discrimination. Instead, the IHRA, as it existed in 1983, rendered mandatory retirement before the age of 70 impermissible while Chicago's mandatory retirement plan applied to police officers who attained the age of 63. Chicago's ordinance was enacted pursuant to the Illinois Municipal Code, Ill. Rev. Stat. ch. 24, ¶ 10-1-18(c). In March 1983, the Illinois Municipal Code provided that a city adopting the Illinois Municipal Code "may by ordinance provide an age limit of not less than 63 years as the maximum age for the legal employment of any person employed as a policeman or fireman . . . and may provide in such ordinance for the automatic or compulsory retirement and discharge of such policeman or fireman upon his attainment of the designated retirement age." Ill. Rev. Stat. ch. 24, ¶ 10-1-18 (1983). We thus turn to rules of statutory construction to resolve this apparent conflict between the IHRA and the Illinois Municipal Code, Ill. Rev. Stat. ch. 24, ¶ 10-1-18(c).

As noted in *Jirus*, one such rule is that a specific enactment must prevail over more general laws relating to the same subject matter. 712 F. Supp. at 677 (citing Illinois law). This rule, according to *Jirus*, suggested that the IHRA did not preempt the City of Berwyn's municipal code, which had been enacted pursuant to the Illinois Municipal Code, Ill. Rev. Stat. ch. 24, ¶ 10-2.1-17, because the code explicitly dealt with the mandatory retirement

ages for police officers. *Id.* But *Jirus* found that another rule of construction, requiring that a court read statutory terms according to their plain and commonly accepted meaning, compelled it to read the IHRA to be comparative in scope. *Id.* Thus, *Jirus* held that the local municipal ordinance providing for mandatory retirement at age 60 gave way and that the law in effect on March 3, 1983, was the IHRA. *Id.* at 678.

We do not agree with the *Jirus* court's analysis regarding the comprehensiveness of the IHRA with respect to the resolution of employment discrimination cases in Illinois, nor with its conclusion that the IHRA preempted and rendered void the Illinois Municipal Code. First, the Illinois legislature may limit home rule power only by specifically and expressly declaring the state's exercise of legislative authority to be exclusive. Ill. Const. art. VII, §§ 6(g) & (h); *City of Evanston v. Create, Inc.*, 85 Ill.2d 101, 108, 421 N.E.2d 196, 199 (1981). The IHRA contains no declaration that the state's exercise of power over employment discrimination is exclusive.[1] Chicago is a home rule jurisdiction and it enacted its ordinance pursuant to the Illinois Municipal Code.

Second, even if the IHRA is comprehensive in scope, that does not in our view affect the rule that a specific statute prevails over a more general statute involving the

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[1] The sole provision limiting the concurrent jurisdiction of home rule units in the area of human rights involves housing discrimination. *See* Ill. Rev. Stat. ch. 68, ¶ 7-108(D). In housing cases, the legislature expressly provided: "This paragraph [rendering void and unenforceable any local law which prohibits, restricts, narrows or limits the housing choice of any person] is applicable to home rule units as well as non-home rule units. Pursuant to Article VII, Section 6, paragraph (i) of the Illinois Constitution, this [paragraph] is a limitation of the power of home rule units." *Id.*

same subject matter. There is a difference between exclusive jurisdiction to hear employment discrimination complaints and the power to establish maximum age limits for employment as a police officer. In *Thakkar v. Wilson Enters., Inc.*, 120 Ill. App.3d 878, 458 N.E.2d 985 (1st Dist. 1983), a case relied upon by *Jirus* in ruling that the IHRA prevailed over the Illinios Municipal Code, the issue was whether an aggrieved party could sue directly under the state constitution for discrimination in employment without first exhausting the administrative remedies set forth in the IHRA. *Id.* at 879, 458 N.E.2d at 986. The court found that the legislative history of the IHRA "persuasively suggests that the [legislature] intended for [the IHRA] to be the preemptive vehicle for the *resolution* of employment discrimination cases in Illinois." *Id.* at 881, 458 N.E.2d at 987 (emphasis added). Being the preemptive vehicle for resolving employment discrimination disputes is not the same as being the sole source for establishing age requirements in employment.

Third, at all times, including 1983, mandatory retirement was lawful under both federal and Illinois law if age was a bona fide occupational qualification ("BFOQ"). 29 U.S.C. § 623(f); Ill. Rev. Stat. ch. 68, ¶ 2-104(A)(1). Thus, even if the IHRA did preempt local law, that would not mean that Chicago's mandatory retirement plan for its police officers was invalid. Rather, a preemptive IHRA would have made Chicago's plan subject to challenge on BFOQ grounds. *See* Ill. Rev. Stat. ch. 68, ¶ 2-104(A)(1).

That Chicago's plan may have been subject to challenge on BFOQ grounds does not mean that it was not "in effect on March 3, 1983" for purposes of the 1985 ADEA and IHRA amendments. To hold otherwise would thwart both congressional and state legislative intent in enacting the 1986 exemptions to their age discrimination laws for police officers.

In construing any statute, the cardinal rule, to which all other statutory construction rules are subordinate, is to ascertain and give effect to the true intent of the legislature. *United States v. Sager*, 881 F.2d 364, 365 (7th Cir. 1989). The 1986 amendment to the ADEA exempts retirement plans for police officers who have attained the age of hiring or retirement in effect on March 3, 1983.[2] "The purpose of the 1986 [ADEA amendment] was to provide relief to those jurisdictions which were forced to respond to *[EEOC v. Wyoming]*." *McCann v. City of Chicago*, No. 89 C 2879, Mem. op. at 7 (N.D. Ill. May 3, 1990) (Grady, C.J.). In *EEOC v. Wyoming*, 460 U.S. 226 (1983), decided on March 3, 1983, the Supreme Court upheld Congress' extension of the ADEA to state and local governments. Thus, any state or local retirement plan that did not meet the age requirements of the ADEA became subject to attack under the ADEA on BFOQ grounds. Those state and local governments whose retirement plans were not in compliance with ADEA requirements were under an obligation to modify their plans accordingly. The 1986 ADEA amendment provided relief by exempting retirement plans for police officers that were in effect on March 3, 1983,

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[2] The 1986 ADEA amendment, 29 U.S.C. § 623(i) provides:

> It shall not be unlawful for an employer which is a state, a political subdivision of a State, an agency or instrumentality of a State or political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken—
>
> (1) with respect to the employment of an individual . . . as a law enforcement officer and the individual has attained the age of hiring or retirement in effect under applicable State or local law on March 3, 1983, and
>
> (2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.

29 U.S.C. § 623(i).

thus making it unnecessary for state and local governments to prove that age was a BFOQ for police work.

If, as we infer from *Jirus*, any mandatory retirement plan that was subject to legal challenge on BFOQ grounds could not be the law in effect on March 3, 1983, for purposes of the 1986 ADEA amendment, then Congress engaged in a futile gesture by enacting the amendment. In such a scenario, the only laws that would be in effect on March 3, 1983, would be those that satisfied the ADEA's BFOQ requirements. Congress' intent to relieve state and local governments from the burden of proving that age was a BFOQ would therefore be frustrated.

Similarly, the Illinois legislature amended the IHRA in 1986 to mirror federal efforts; the IHRA amendment, like its federal counterpart, exempted mandatory retirement plans for police officers if the officer attained the age of retirement in effect under applicable state or local law on March 3, 1983. Ill. Rev. Stat. ch. 68, ¶ 2-104(A)(7). The 1986 amendment to the IHRA would be meaningless if we held that, as of March 3, 1983, the IHRA preempted all mandatory retirement plans. We simply cannot presume the Illinois legislature to have engaged in a meaningless gesture by enacting the 1986 IHRA amendment. *Jirus*, 712 at 677 (citing *Pliakos v. Illinois Liquor Control Comm'n*, 11 Ill.2d 456, 143 N.E.2d 47 (1957)).

The court in *Jirus* acknowleged the 1986 amendment to the IHRA, but stated that the amendment "in reality begs the question—state law now is whatever state law was in March 1983, without any legislative judgment as to what it means, despite the implied hope that earlier retirement dates would be upheld." 712 F. Supp. at 677. We agree with *Jirus* that the relevant law is whatever law was in effect on March 3, 1983, but if we followed

Jirus to its logical conclusion, we would effectively repeal the 1986 ADEA and IHRA amendments as well as the Illinois Municipal Code.

Courts disfavor implied repeal of statutes and invoke the rule only when one statute is irreconcilably inconsistent with a later-passed statute. *Cook County v. Midcon Corp.*, 773 F.2d 892, 905 (7th Cir. 1985); *Spaulding School Dist. No. 58 v. Waukegan City School Dist. No. 61*, 18 Ill.2d 351, 356-57, 164 N.E.2d 63, 67. The intention of the legislature to repeal must be "clear and manifest." *Midcon Corp.*, 773 F.2d at 905; *accord*, *Spaulding*, 18 Ill.2d at 357, 164 N.E.2d at 67. We think it anything but "clear and manifest" that the Illinois legislature intended to repeal the Illinois Municipal Code, Ill. Rev. Stat. ch. 24, ¶ 10-1-18(c), by enacting the IHRA. We hold that the IHRA did not repeal that provision of the Illinois Municipal Code and thereby preempt Chicago's ordinance.[3]

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[3] Our holding is consistent with Illinois cases holding that the IHRA did not preempt specific laws governing retirement and pension. *City of Benton Police Dept. v. Illinois Human Rights Comm'n*, 160 Ill. App.3d 55, 513 N.E.2d 29 (5th Dist. 1987) (police pension board had exclusive authority to reinstate disabled officer and Illinois Human Rights Commission was without jurisdiction to hear officer's complaint that board's refusal to reinstate him was discriminatory), *appeal denied*, 118 Ill.2d 541, 520 N.E.2d 383 (1988); *Board of Trustees of the Police Pension Fund of the City of Urbana v. Illinois Human Rights Comm'n*, 141 Ill. App.3d 447, 490 N.E.2d 232 (4th Dist. 1986) (Illinois pension code gave board of trustees of pension fund exclusive authority over police officer's eligibility to participate in the fund, thus Human Rights Commission had no jurisdiction to proceed on police officer's civil rights complaint).

CONCLUSION

The IHRA, as it existed on March 3, 1983, did not preempt Chicago's 1983 mandatory retirement plan. Therefore, we adhere to our May 3, 1990, memorandum opinion dismissing Count I.

DATED: December 19, 1990

ENTER: /s/ John F. Grady
United States District Judge

[DATED AUGUST 7, 1991]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WILLIAM A. McCANN, et al.,	)	
	)	
Plaintiffs,	)	
v.	)	
	)	
CITY OF CHICAGO, a municipal corporation,	)	
	)	
	)	No. 89 C 2879
Defendant.	)	CONSOLIDATED WITH
ELI BLUMENTHAL,	)	No. 90 C 0464
	)	
Plaintiff,	)	
v.	)	
	)	
CITY OF CHICAGO,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

This class action age discrimination case is before the court on the cross-motions of the parties for summary judgment on Count II of plaintiffs' complaint, and on plaintiffs' motion for summary judgment on Count III of the complaint.

FACTS

Plaintiffs are sworn non-union members of the Police Department of defendant City of Chicago who have been retired mandatorily from the Police Department at any

time since March 1, 1988, because they were age 63 or older. The members of the plaintiff class and plaintiff Eli Blumenthal[1] held the rank of sergeant or above at all times from December 31, 1987, through their retirement.

The events leading up to this action began on March 3, 1983, when the United States Supreme Court held that the extension of the Age Discrimination in Employment Act ("ADEA") to municipalities was constitutional. *EEOC v. Wyoming*, 460 U.S. 226 (1983). At that time, the ADEA prohibited the mandatory retirement of persons under age 70, 29 U.S.C. § 623(a)(1), unless the employer could demonstrate that age was a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. § 623(f)(2).

In 1986, Congress amended the ADEA to state that

> [i]t shall not be unlawful for an employer which is a State (or) a political subdivision of a State . . . to discharge any individual because of such individual's age if such action is taken (1) with respect to the employment of an individual as a firefighter or as a law enforcement officer and the individual has attained the age of hiring or retirement in effect under applicable State or local law on March 3, 1983, and (2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purpose of this chapter.

29 U.S.C. § 623(i). The mandatory retirement age for Chicago police officers on March 3, 1983, was 63. The amended act delayed its effectiveness for city employees who had entered into collective bargaining agreements that were

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[1] Blumenthal, who brought a separate action that has been consolidated with the class action, has adopted the allegations of the class complaint as to Count II.

in effect on June 30, 1986. The act stated that "such amendments shall not apply until the termination of such collective bargaining agreement or January 1, 1990, whichever comes first." Age Discrimination in Employment Act Amendments of 1986, Pub. L. 99-592, Section 7.

At the times relevant to this case, employment of all sworn police officers below the rank of sergeant was governed by a collective bargaining agreement between the City of Chicago and the Fraternal Order of Police, Chicago Lodge Number 7, effective January 6, 1986 ("the 1986 agreement"). The 1986 agreement prohibited discrimination on the basis of age against officers below the rank of sergeant who were between the ages of 40 and 70.[2] On January 31, 1988, the City of Chicago enacted a municipal ordinance which lowered the retirement age for all sworn police personnel from 70 to 63 years of age. Because of the exemption under the amendments to the ADEA, the retirement age for police officers protected by the collective bargaining agreement remained at 70 until 1990.

As a result of the combined effect of the 1988 ordinance and the 1986 collective bargaining agreement, from March 1988 to January 1990, there was a discrepancy of seven years between the mandatory retirement age of police officers with ranks of sergeant and above (63 years) and that of police officers below the rank of sergeant (70 years). In Count II of their complaint, plaintiffs claim that this discrepancy violated the Equal Protection Clause of the Fourteenth Amendment to the United States Consti-

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[2] The 1986 agreement continued in effect until February 7, 1990, when the City Council ratified a new agreement between the city and the Fraternal Order of Police. The 1990 agreement established a mandatory retirement age of 63 for sworn police officers below the rank of sergeant.

tution. In Count III of their complaint, plaintiffs claim that they were denied payments to their pension fund as a result of the discrimination described in Count II.

DISCUSSION

Under Federal Rule of Civil Procedure 56(c), summary judgment should be granted if there exists no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In this case, the parties have stipulated to the material facts, and both sides assert that they are entitled to judgment as a matter of law.

Plaintiffs claim that the 1988 municipal ordinance, which established a mandatory retirement age of 63 for sworn police officers ranked as sergeants and above, but not for sworn police officers below the rank of sergeant, violated the Equal Protection Clause of the Fourteenth Amendment. This equal protection challenge does not involve a suspect class, or a fundamental right. Therefore, the ordinance is subject to a rational basis review, and is constitutional if it is rationally related to a legitimate government interest. *See Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 312 (1975).

The city argues that the 1986 amendments to the ADEA provide the rational basis for the 1988 ordinance. The 1986 amendments authorized the city to lower the mandatory retirement age for police officers to 63, the retirement age in effect in March 1983, but did not require the city to do so. The fact that the ADEA allowed the city to act does not alone provide a rational basis for the decision to act. However, we are not limited in our review to the rationale that the city provides. Rather, "[i]f the court can hypothesize plausible reasons for legislation

that are within the legitimate goals of a government, nothing else is required to validate the governmental classification and it does not matter whether the reasons advanced actually motivated the legislative action." *Evans v. City of Chicago*, 873 F.2d 1007, 1016 (7th Cir. 1989) (citing *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980)).

In this case, the city could have been motivated by a concern over the ability of police officers over the age of 63 to meet the physical demands of the job and the safety of the community they were to protect. *See Murgia*, 427 U.S. at 315. In *Murgia*, the Supreme Court found that a Massachusetts law which established a mandatory retirement age of 50 for state police officers was rationally related to the legitimate state goal of maintaining a healthy and fit police force. *Id.* The Court's reasoning in *Murgia* applies to the facts of this case. *See also, Gregory v. Ashcroft*, 59 LW 4714, 4720 (June 20, 1991) (finding that the provision of the constitution of the State of Missouri that sets a mandatory retirement age of 70 for Missouri state judges did not violate the Equal Protection Clause, the court noted, "The people of Missouri rationally *could* conclude that the threat of deterioration at age 70 is sufficiently great, and the alternatives for removal sufficiently inadequate that they will require all judges to step aside at age 70." (emphasis added)).

The city also had a rational basis for its failure to extend the ordinance to all sworn police officers, including those below the rank of sergeant. In 1988, officers below the rank of sergeant were protected by the 1986 collective bargaining agreement, which set their retirement at age 70. However, the city did lower the retirement age of officers below the rank of sergeant to 63 when it was

able to do so, in 1990.[3] In *Evans v. Chicago*, the court found that a city policy of paying off smaller judgments (those under $1,000) more quickly than larger judgments (those over $1,000) did not violate the Equal Protection Clause. The court stated that the policy was rational because "the city is merely attempting to satisfy as many individual claimants as possible with the limited revenues available." *Evans*, 873 F.2d at 1016. In the case at hand, the city was merely attempting to retire as many police officers as possible at the age of 63, and was limited to the extent that some police officers were protected by the collective bargaining agreement. This reasoning withstands scrutiny under the deferential standard for rational basis review. *See, e.g., Pontarelli Limousine, Inc. v. City of Chicago*, 929 F.2d 339, 342 (7th Cir. 1991) (courts will uphold statutes under rational basis review unless they are "patently, wildly, totally irrational."); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (where rationality is the test, a state "does not violate the Equal Protection Clause merely because the classifications made by the laws are imperfect.").

Finally, plaintiffs have moved for summary judgment on Count III of their complaint. Proceedings regarding Count III had been stayed until this court's determination of Count II, and plaintiffs admit that their Count III claim hinges on a favorable ruling on Count II. Therefore, plaintiffs' motion for summary judgment on Count III is

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[3] As noted above, the 1986 amendments allowed collective bargaining agreements to supersede the Act only until 1990, or until a new collective bargaining agreement was reached. ADEA Amendments of 1986, Pub. L. 99-592, §7. In February 1990, the city entered into a collective bargaining agreement with the Fraternal Order of Police which lowered the retirement age of officers below the rank of sergeant to 63 years.

denied, and Count III is dismissed with prejudice. Since there are no remaining claims against defendant and it appears that plaintiffs would be unable to cure the defects by amendment, final judgment will be entered in favor of defendant.

CONCLUSION

Defendant's motion for summary judgment as to Count II is granted. Plaintiffs' motion for summary judgment as to Counts II and III is denied, and Count III is dismissed with prejudice. Case set for status hearing on September 3, 1991, at 10:00 a.m. to discuss entry of a judgment order.

DATED: August 7, 1991

ENTER: /s/ John F. Grady
United States District Judge.

[Dated September 3, 1991]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WILLIAM A. McCANN, et al.,	)	
	)	
Plaintiffs,	)	
v.	)	No. 89 C 2879
	)	
CITY OF CHICAGO, a municipal corporation, and the POLICEMAN'S ANNUITY AND BENEFIT FUND OF CITY OF CHICAGO,	)	
	)	
Defendants.	)	

FINAL JUDGMENT ORDER

The court having granted the motions of the defendants to dismiss and for summary judgment, final judgment is hereby entered in favor of the defendants, City of Chicago, a municipal corporation, and the Policeman's Annuity and Benefit Fund of the City of Chicago, and against the plaintiffs, William A. McCann, George J. Marcin, Thomas P. McGady, August R. Locallo, James R. Hutton, Michael J. Connolly, Robert S. Vetrovec, William J. Duffy, Caldron Manns, Anthony Palka, John Griffith, William Bransfield, James P. Moss, Ernest K. Taylor, and Kenneth Brooks, individually and as representatives of the plaintiff class, dismissing this cause with prejudice.

DATED: September 3, 1991

ENTER: /s/ John F. Grady
United States District Judge